



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: OMOLO, GITHINJI & VISRAM, JJA.)
CRIMINAL APPEAL NO. 37 OF 2010

BETWEEN

JOHN MOGESI NJARWAAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisii (Musinga & Muchelule JJ.) dated 8th September 2010

In

H.C.CR. A. No. 91 of 2009)

JUDGMENT OF THE COURT

The appellant was convicted by the Ag. Senior Principal Magistrate Migori of the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and sentenced to death. His first appeal to the superior court was dismissed leading to the present appeal.

The appellant was alleged to have robbed Samuel Robi Marwa of KShs. 10,200 and a bicycle valued Shs. 7,000 on 11th January 2009.

The complainant Samuel Robi Marwa (PW1) testified among other things that, on 11th January 2009 as he was pushing his bicycle uphill at 6 p.m. he saw three boys whom he knew before; that the three boys attacked him and stabled him three times; that they robbed him of a bicycle and Shs. 10,200; that he fell down and the three boys hit him with a stone and broke his teeth, and that some women and men intervened and he was taken to hospital. Two witnesses, Mary Robi (PW2) and Margaret Robi Nchagwa (PW3) gave similar evidence, that on their way home, the complainant passed them while riding a bicycle; that they saw three people whom they knew including the appellant beat the complainant using stones; that the two witnesses intervened and asked the appellant and his two confederates why they were killing the complainant; that the three thereupon left the scene taking away the complainant's bicycle, and, lastly, that a motor cycle came and took the complainant to hospital. There was the evidence of CPL Rael Njems of Isebania Police Station (PW5) that the complainant reported the robbery on 12th January 2009 and that he issued him with medical examination report form (P3-form) and also the evidence of APC Letrag Elija (PW4) of Mabera Division that on 17th January 2009 the complainant brought warrant of arrest relating to appellant and two others, and that he arrested the appellant on the following day.

The appellant gave sworn evidence at the trial and testified that he used to work for the complainant; that he owed the complainant Shs. 2,000 which he had promised to pay; that the complainant brought youth wingers to arrest him; that they differed; that he reported the matter to chief

and that police arrested him later. He claimed that the two material witnesses Mary Robi and Margaret Robi were wives of the complainant.

The appellant raised several grounds of appeal including failure by the superior court to re-evaluate the evidence and also failure to appreciate that the elements of the charge were not proved beyond reasonable doubt.

Mr. Madialo, learned counsel for the appellant, submitted, among other things, that, had the superior court analyzed the evidence it could have found that the conduct of the appellant was not that of a robber; that the appellant went to the police station to report; that the appellant surrendered himself to police on 17th January 2009 – a day before arrest; that, Mary Robi and Margaret Robi were complainant's wives and that the evidence may have proved assault and not robbery.

In this case the trial magistrate believed the evidence of the complainant and the two material witnesses Mary Robi and Margaret Robi. The trial magistrate particularly considered the appellant's defence and made findings that Mary Robi and Margaret Robi were not wives of the complainant but neighbours and that the report of the incident to police was not motivated by employment dispute. The trial magistrate concluded:-

“The evidence shows that they attacked the complainant three of them that is the accused, Warema, Wegesa and they used knives and stones to wound the complainant.

Medical evidence shows that the complainant was wounded on the head and stitched; he also lost the upper canine teeth and others made loose, he also sustained bruises and tenderness of the chest, right elbow and right knee and cut injuries. Injury assessed as grievous harm.”

The superior court made findings that the complainant was attacked and robbed by the appellant and two others and, that Mary Robi and Margaret Robi witnessed the incident which occurred in broad day light.

At the trial the appellant cross examined both Mary Robi and Margaret Robi and put it to them that they were wives of the complainant. Each denied. Margaret Robi in particular testified that the two of them reported the incident to the complainant's wife.

We have no reason for interfering with the concurrent findings of the two courts below on the basic facts that the appellant and two others attacked and injured the complainant which incident was witnessed by Mary Robi and Margaret Robi.

However while the trial magistrate evaluated the evidence relating to assault of the complainant commendably he did not do so regarding the evidence relating to the robbery. The evidence of the appellant was that Shs. 10,200 and a bicycle were stolen was believed without any evaluation. Similarly the superior court failed to re-evaluate the evidence relating to the robbery.

The medical examination report (P3 form) shows the complainant reported the offence at the police station on 12th January 2009 at 9.30 a.m. alleging:-

“.....TO HAVE BEEN ASSAULTED BY SOME PEOPLE KNOWN TO HIM”

The P3 form further shows that when the complainant appeared for medical examination on 14th January 2009 the examiner noted:-

“Alleges to have been assaulted by people known to him – reason not known”.

Thus the complainant reported assault and not robbery. The appellant is a neighbour of the complainant. APC Elijah supported the evidence of the appellant that the appellant in fact reported at the police station a day before the arrest.

It is probable if the appellant had committed a serious crime of robbery he could have escaped and

could not have reported to police.

On analysis we are satisfied that the offence proved was causing grievous harm and not robbery. Accordingly, the appeal is allowed to the extent that the conviction for robbery with violence contrary to **Section 296(2)** is set aside and the sentence of death set aside. Pursuant to section 179(1) of the Criminal Procedure Code we substitute therefor a conviction for grievous harm contrary to **Section 234** of the **Penal Code** and sentence the appellant to 7 years imprisonment with effect from 2nd March 2009 when he was sentenced by the subordinate court. We so order.

Dated and delivered at Kisumu this 2nd day November, 2011

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

I certify this is a true copy of the original

DEPUTY REGISTRAR